Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1184

AMERICAN TRADING TRANSPORTATION COMPANY, INC. (Formerly AMERICAN TRADING AND PRODUCTION CORPORATION) and JOSEPH V. FINN, *Petitioners,*

vs.

ARNOLD ESCOBAR, *Respondent,*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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No.

AMERICAN TRADING TRANSPORTATION COMPANY, INC. (Formerly AMERICAN TRADING AND PRODUCTION CORPORATION) and JOSEPH V. FINN, *Petitioners,*

vs.

ARNOLD ESCOBAR, *Respondent,*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit, first entered in this case June 5, 1974, as to which rehearing was denied December 20, 1974.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the United States District Court for the Northern District

of California are reported at 1973 A.M.C. 88 and set forth in the Appendix, *infra*. The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 503 F.2d 271, 1974 A.M.C. 1425 and set forth in the Appendix, *infra*.

JURISDICTION

On June 5, 1974, the Court of Appeals entered its Judgment of the same date. Petitioner filed a timely Petition for Rehearing which was finally denied by an Order dated December 20, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The principal questions arising from the decision of the Court of Appeals are:

1. Where a seaman discharged for cause thereafter incurs misconduct expenses ashore for which his former employer, the shipowner, is not responsible, and requests the shipowner to pay them, making a valid promise to reimburse the shipowner, and the shipowner in reliance pays the expenses, deducting the amount of the payment from wages otherwise due the seaman, is there a failure to make payment "to the seaman" within the meaning of R.S. §4529 (46 U.S.C. §596), so that the seaman may thereafter recover the same amount again from the shipowner as wages, and in addition recover double wage penalties under the statute for failure to pay promptly?

2. Is the shipowner's reliance upon an admittedly valid request and agreement by a seaman to pay his

debts in exchange for reimbursement by the seaman, "sufficient cause" within the meaning of R.S. §4529 (46 U.S.C. §596) providing that there shall be no penalty for failure of prompt payment of wages unless the shipowner acted "without sufficient cause"?

3. When the Court of Appeals announces a new rule, or one theretofore unarticulated, reversing the District Court's ruling that a deduction was legally proper, should the shipowner then be penalized for having insufficient cause to believe the law to be as the District Court held?

An additional and broader question raised is whether this Court should not reconsider and overrule, or at least modify, the ruling in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 1971 A.M.C. 286 (1971), which permits continued litigation in the United States courts under 46 U.S.C. §596 of suits such as this, for which arbitration is provided in collective bargaining agreements, while other such disputes subject to the Taft-Hartley Act (Labor Management Relations Act of 1947, 29 U.S.C. §§141 et seq.) must be arbitrated.

STATUTE INVOLVED

R.S. §4529 (46 U.S.C. §596) is involved in this case:

> The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after

the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts.

STATEMENT OF THE CASE

Jurisdiction of the District Court lay in admiralty under 28 U.S.C. §1333, by virtue of a complaint for seaman's wages and penalties brought against the ship's captain and its owner.

The material facts are set forth in the District Court's Findings of Fact (Appendix, *infra*)[1] and are summarized here.

Escobar, an American seaman, was fired for threatening to murder the Master and Chief Engineer of the SS WASHINGTON TRADER at Subic Bay, Philippines. "I will cut your throat too you son-of-a-bitch and what can you two do about it." As Escobar was being escorted off the vessel by police, he slipped and fell on a gangway.

---

[1]The full, uncontested Findings should be read carefully because the Court of Appeals misapprehended some Findings in reversing the District Court on its Conclusions of Law.

Therefore, rather than going to jail or somewhere else, he was taken to the U.S. Navy Hospital where he remained for four days (March 5-10, 1969). After discharge from the hospital, Escobar presented himself to the vessel's agent in Manila, requesting his earned wages. Since the amount of wages was unknown to the agent, the agent initiated a series of world-wide radio communications between the agent in Manila, owners in New York, and the vessel, then crossing the Indian Ocean. This exchange consumed several days and was not completed until after Escobar had left Manila on March 13, 1969.

While the agent was awaiting advice on the amount of wages due Escobar, the U.S. Consul in Manila independently told Escobar he had to go to San Francisco to answer charges brought against him by the U.S. Coast Guard arising out of his threat to murder the Master and Chief Engineer. The vessel's agent in Manila agreed to advance money to pay for Escobar's airplane ticket to San Francisco as well as personal hotel expenses and other expenses Escobar incurred while in Manila, if Escobar would agree that he would reimburse the vessel's owners for all these expenses which he incurred ashore after his discharge from the vessel. Escobar so agreed orally, and he signed an "Acknowledgment Certificate". In reliance on Escobar's agreement, owners through their agent in Manila then purchased an airplane ticket and paid the other obligations Escobar had incurred ashore after his firing. (Hence to this extent he received "payment in kind" in lieu of cash payment.)

The airplane ticket and other expenses, not including a U.S. Navy Hospital bill, came to $536.72. Escobar's wages came to $883.04. Accordingly, after his arrival in

San Francisco, Escobar was paid $346.32, owners taking credit pursuant to Escobar's agreement for the payment in kind of $536.72 which had been advanced in Manila for his benefit after his firing from the vessel.

Captain Finn and the owners were not served with any complaint for the disputed $536.72 until August 1970, sixteen months later. Within thirty (30) days, owners, acting upon the authority of past precedent, tendered a cash payment in this amount ($536.72) to Escobar, without prejudice, in order to end the running of any conceivable penalty under 46 U.S.C. §596. Owners cross-claim for return of this sum ($536.72) as well as for an additional $212.62 in hospitalization expenses which they had later paid. The District Court ruled in owners' favor on this cross-claim for $787.72. The District Court also ruled that payment of the undisputed balance of wages, $346.32, was unreasonably delayed 21 days and assessed a penalty of $596.10 against the owners. The total owners' award ($787.72) was greater than Escobar's award of penalty ($569.10), and therefore judgment was entered in owners' favor in the amount of $212.62.

Both parties appealed. The Court of Appeals reversed the District Court in part, although affirming the owners' cross-claim recovery on the agreement, and ordered assessment of additional unspecified penalties.

The Court of Appeals obviously knew a grave injustice was being committed but felt bound by *Matise v. American Foreign S.S. Co.*, 488 F.2d 469, 1974 A.M.C. 1419 (9th Cir. 1974), an opinion of a different panel of the same court, which came down after oral argument and before decision in this case. Chief Judge Chambers in his separate opinion in the *Escobar* case stated:

> While I concur in the foregoing, the result is horrible. I am not concerned with the policy of double wage recovery generally. But the statute in this type of case results in a taking which is unconscionable. The Congress should do something about it. [503 F.2d at 274, 1974 A.M.C. at 1430]

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Ninth Circuit in this case is in direct conflict with decisions of the Court of Appeals for the Second Circuit in *Lewis v. Hudson Waterways,* 495 F.2d 604, 1974 A.M.C. 1228 (2d Cir. 1974) cert. denied ..... U.S. ....., 42 L.Ed.2d 72, and *Suissa v. American Export Lines, Inc.*, 507 F.2d 1343 (2d Cir. 1974) and with decisions of the Court of Appeals for the Third Circuit in *Roeder v. Alcoa Steamship Co.*, 422 F.2d 971, 1970 A.M.C. 697 (3d Cir. 1970), as well as with its own unpublished decision in *Gearin v. Weyerhaeuser Line,* No. 73-6805, cert. denied ..... U.S. ....., 42 L.Ed. 124. The Court of Appeals has in this case also decided a Federal question in a way in conflict with the applicable decisions of this Court, *Collie v. Fergusson,* 281 U.S. 52, 1930 A.M.C. 408 (1930), and *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 1952 A.M.C. 1283 (1952).

The decision below also brings into focus an important and growing problem stemming from this Court's ruling in *U.S. Bulk Carriers, Inc. v. Arguelles, supra,* that such cases may be litigated in the Federal courts, notwithstanding agreements in collective bargaining contracts to arbitrate them, combined with the prospect of gain to both seamen plaintiffs and their contingent fee lawyers

by delaying suit in such cases to dramatically increase the penalties recoverable.

Conflict with the Second Circuit

A simple reading of *Lewis v. Hudson Waterways, supra,* and *Escobar,* will show that the Ninth Circuit is in direct conflict with the Second Circuit. In each case the seaman made an oral and written agreement directing payment of his wages to someone else. In *Lewis* the Court found that the agreement was invalid. In *Escobar* the Court found that the agreement was valid. In *Lewis* the question arose in the District Court whether the withholding based upon the invalid agreement was nonetheless made with "sufficient cause" within the meaning of §596 so that no penalties would be assessable. In *Escobar* the District Court never had to reach the question of "sufficient cause" because the agreement was held to be valid. In *Lewis* the Court of Appeals for the Second Circuit upheld a finding that a payment made to a third person based upon what was found to be an invalid agreement was still made with "sufficient cause" and, therefore, no penalty should be assessed. In *Escobar* the shipowner, who made a payment based upon an agreement held to be valid, and who has never had any finding in the District Court as to "sufficient cause", has been peremptorily ordered back to the District Court for the assessment of penalties. The *Escobar* facts, if presented to the Court of Appeals for the Second Circuit, would clearly have resulted in a contrary judgment.

In *Suissa v. American Export Lines, Inc., supra,* the shipowner did not pay, but offered to pay, not the wages demanded by the seaman, but a smaller sum which the

seaman's union representative thought was a fair settlement of the dispute. The seaman never acquiesced in the proposed settlement and always insisted that his proper wages were being wrongfully withheld. On these facts, the Court of Appeals for the Second Circuit held that the shipowner's conduct was of such a nature that, even if the shipowner was wrong, no penalty could be assessed as a matter of law because the failure to make the payment (the "withholding") was with "sufficient cause" within the meaning of R.S. §4529 (46 U.S.C. §596). By contrast in the *Escobar* case, the Court of Appeals for the Ninth Circuit has held that there is not even a question of fact as to "sufficient cause" and that a shipowner must be penalized under R.S. §4529 (46 U.S.C. §596) when it actually parts with the money and makes payments directly to a third person, as agreed by the seaman, and the seaman has validly agreed to reimburse the shipowner for the payments. These drastically different rules of law are being applied in interpretation of the statutory phrase "sufficient cause" in the Ninth Circuit and in the Second Circuit.

Conflict with the Third Circuit

In *Roeder v. Alcoa Steamship Co., supra,* the shipowner attempted to make a 46 U.S.C. §701 deduction for misconduct. The procedure was void on its face and could not possibly have given rise to a proper deduction. But the shipowner was given the opportunity by the Court of Appeals to persuade the trial judge that its conduct was with "sufficient cause" even though illegal. Here in *Escobar* the shipowner has never been permitted to have a trial in the district court on the issue of

whether its conduct in abiding by a valid agreement was with "sufficient cause".

Thus the Court of Appeals for the Third Circuit would also differ with the Court of Appeals for the Ninth Circuit on the *Escobar* facts in defining "sufficient cause".

Conflict within the Ninth Circuit

There is also a conflict between panels of the Court of Appeals for the Ninth Circuit, as can be seen from the file of this Court in *Gearin v. Weyerhaeuser Lines,* No. 73-6805, in which the seaman's petition for certiorari was denied in October 1974. An illegal deduction for airplane fare from Hong Kong to Okinawa (and minor expenses) was involved. A finding of "sufficient cause" in favor of the shipowner was upheld on appeal. The Court of Appeals opinion in *Gearin* is unpublished, and the panel in *Escobar* was not permitted to rely upon the *Gearin* panel's eight-page opinion as authority under Rule 21(c) of the Rules for the U.S. Court of Appeals, Ninth Circuit. Because the opinion of the *Matise* panel was published, however, the *Escobar* panel could and did rely on it.

Petitioners realize that conflict within the circuit is not generally ground for granting of certiorari, but believe it is nevertheless of substantial significance in the circumstances here. There have been four appeals on §596 cases in the Ninth Circuit in 1974[2] in which 11 different judges sat. Only one judge appeared in more than one case. The size of the Court both encourages conflicting results, and discourages resolution by an en banc hearing,

[2]*Gearin v. Weyerhaeuser Lines, supra; Matise v. American Foreign Steamship Company, supra; Golden v. Newport Tankers Corporation, infra;* and the instant case.

which is almost never granted and was denied in this case and in the *Matise* case.

Conflict with Applicable Decisions of this Court

This Court, dealing with the question of "sufficient cause" in *Collie v. Fergusson, supra,* said, "The phrase 'without sufficient cause' must be taken to embrace something more than valid defenses to the claim for wages", and went on to say that the words "connote either conduct which is in some sense arbitrary or willful, or at least a failure not attributable to impossibility of payment". (281 U.S. at 55, 1930 A.M.C. at 410)

In *Lewis v. Hudson Waterways Corp., supra,* where wages were wrongfully applied to an invalid assignment, the Court of Appeals for the Second Circuit expressed the teaching of *Collie v. Fergusson, supra,* in this way:

> . . . [A]lthough the jury in special verdicts found the assignment invalid, it also specifically found that the ship had not acted unreasonably in paying Molnar the sum due Lewis.
>
> • • •
>
> The penalty, now approximately $90,000, is only to be imposed for "'arbitrary and unscrupulous action'". *McCrea v. United States,* 294 U.S. 23, 30, 55 S.Ct. 291, 79 L.Ed. 735 (1935), and ". . . [t]here is neither justice nor policy in aiding [this plaintiff] to catch at penalties, [when he has] suffered no wrongs." *Petterson v. United States,* 274 F. 1000 (S.D.N.Y. 1921) (L. Hand, J.).
>
> The judgment of the district court is affirmed. [495 F.2d at 606, 1974 A.M.C. at 1230.]

There is no finding that Captain Finn's action or the shipowners' action here was arbitrary or willful or un-

scrupulous or even in any degree unreasonable. Nor is there any record which would support such a finding of fact. On the contrary, we submit, the shipowners' payment of Escobar's expenses out of his wages was, in light of his agreement, eminently reasonable when no court had ever previously held that course improper. The decision below was thus in plain conflict with this Court's ruling in *Collie v. Fergusson, supra.*

The Supreme Court has dealt substantively with the problems of §596 only twice in many years, *Collie v. Fergusson, supra,* in 1930, and *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 96 L.Ed. 1294, 1952 A.M.C. 1283 (1952). In *Isbrandtsen* a seaman, Johnson, stabbed a second seaman, Brandon, causing the employer, Isbrandtsen Lines, to incur substantial expenses taking care of the victim. Isbrandtsen then unilaterally reduced Johnson's wages, claiming a right to reimbursement, which Johnson denied. Even though Isbrandtsen had never charged Johnson with any violation, or ever reached any agreement with him, they treated the assault as a fining offense under 46 U.S.C. §701. This Court held such unilateral reduction improper. It would have been unfair to assess a penalty where the law was unsettled, and none was assessed. This Court held that when debts were claimed, the shipowner had to use "other means"[3] to prove and liquidate its claims, and could not unilaterally fine the seaman. But this Court did not define "other means".

The district court in the *Escobar* case held the bilateral agreement to reimburse was a valid "other means". The district court also noted the difference when the miscreant seaman, Escobar, received the direct benefit of his

[3]343 U.S. at 787, 1952 A.M.C. at 1290 (1952).

wages, as contrasted with Johnson, who never received anything and whose wages were used by Isbrandtsen to pay its expenses for Brandon. The Courts of Appeals for the Second Circuit and Third Circuit would have agreed, although the Ninth Circuit did not. In addition, the Court of Appeals for the Ninth Circuit missed the most basic point of *Isbrandtsen Co. v. Johnson, supra,* by requiring penalties as a matter of law when they reversed lower court precedent. This disposition is therefore inconsistent with both *Collie v. Fergusson, supra,* and *Isbrandtsen Co. v. Johnson, supra.*

Litigation or Arbitration

This Court should re-examine its holding in *U.S. Bulk Carriers v. Arguelles, supra.* In the trial court petitioners presented this point by a *pro forma* motion to dismiss on the ground that Escobar's remedy was through arbitration under his collective bargaining agreement, fully advising this Court that the motion was contrary to *U.S. Bulk Carriers v. Arguelles, supra.* The motion was denied. This was not initially argued on appeal by the shipowner because the shipowner had prevailed on the merits in the trial court. The point was mentioned in the Petition for Rehearing in the Court of Appeals, which petition was denied, and therefore was brought to the attention of the Ninth Circuit.

We respectfully suggest that this Court should reconsider the *Arguelles* decision and overrule its prior opinion.

Collective bargaining agreements generally provide that disputes over pay are subject to collective bargaining grievance procedures. See, *e.g., Suissa v. American*

Export Lines, Inc.,[4] *supra.* Such procedures require complaint promptly, usually in about 30 days absent good reasons for delay. Although suit was long delayed here, plaintiff's attorney contends that his client is entitled to penalties from the day of the alleged wrongful withholding through the day of judgment in the District Court, some three and one-half years after award. This litigation affords plaintiffs, through delay, a handsome investment at a rate of return available nowhere else and, through contingent fee contracts, the same opportunity and motivation to delay is shared by their attorneys.

In this case the seaman's attorney was hired by the seaman on the day the seaman returned to the United States, March 14, 1969. The seaman's attorney, although claiming a right for double wage penalties from that date, never initiated proceedings to collect the alleged wrongful withholding until he filed suit 15 months later, and then did not serve the complaint on the defendant for another month, making it 16 months before defendant was effectively sued. The agreed amount which was in dispute, $536.72, was then paid by the shipowner within 30 days without prejudice to stop any further possible penalty. See *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81 at 88, n.26 (3d Cir. 1966). Defendant shipowner then moved for an immediate trial setting and, although the Court could have accommodated the trial, plaintiff's

[4]The case of *Golden v. Newport Tankers Corporation*, No. 73-1435, U.S. Court of Appeals for the Ninth Circuit, unpublished opinion dated September 13, 1974, involving the same counsel as in this case, also involved the collective bargaining grievance procedure vs. lawsuit tangle described in *Suissa v. American Export Lines, Inc., supra.*

attorney resisted and refused to permit an immediate setting for trial.

Although the delay in this case preceded the publication of the *U.S. Bulk Carriers v. Arguelles, supra,* opinion, that opinion countenances and encourages ever increasing delay, such as occurred here. The potential profit of delay is so great that it is no wonder prompt arbitration is so rarely sought.

Importance of the Issues

The issues raised by this appeal are important generally. There are an increasing number of "double wage penalty" cases, as the cases cited in this petition show. San Francisco Counsel for the shipowner in this case have themselves also personally been involved in three appeals to the U.S. Court of Appeals involving double wage penalty cases in the past eighteen months, and in addition there was the *Matise* appeal. We know that *Escobar* is the fourth decision to result in a Petition for Writ of Certiorari in the past six months on a §596 question.[5] We have tried an additional case in the United States District Court which was settled pending appeal, and have settled another case pending in the United States District Court within the last several months. We know of at least one other case pending in San Francisco.

The issues raised in this appeal have significant impact upon seamen and their employers, the shipowners. Most shipowners can be sued on either the east coast (Second

[5]*Lewis v. Hudson Waterways Corp., supra; Gearin v. Weyerhaeuser Lines, supra; Matise v. American Foreign Steamship Company, supra,* and this case.

Circuit or Third Circuit) or on the west coast (Ninth Circuit). Any seaman now will clearly choose the Ninth Circuit because the same facts which would result in judgment for the shipowner on the east coast will result in judgment for the seaman on the west coast. And choice of the forum lies in the seaman's hands.

There will continue to be a basic unfairness to all litigants, and particularly to shipowners, as they will not have a choice of forum, until this Court, on writ of certiorari reviews the recent conflicting decisions under R.S. §4529 (46 U.S. §596) and enunciates a clear rule of law which can be understood by all.

Respectfully submitted,

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March 14, 1975

(Appendix Follows)

APPENDIX

Appendix

United States District Court
Northern District of California

In Admiralty No. C-70 1245 LHB

Arnold Escobar,
Plaintiff,

vs.

The SS Washington Trader, her engines, tackle, apparel, etc., American Trading and Production Corporation, Joseph V. Finn, Jr.,
Defendants.

[Filed Sep. 11, 1972]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

The above matter was called for trial on July 19, 1972, and then continued for trial on July 20 and July 21, 1972. The parties having appeared and evidence having been received, the court hereby makes its Findings of Fact and Conclusions of Law:

1. Plaintiff Escobar is an American seaman who was employed by defendant, American Trading and Production Corporation, which owned and operated an American

Flag tanker, the SS Washington Trader, the master of which was the defendant Joseph V. Finn.

2. Escobar was a seaman aboard the vessel from the commencement of the voyage in November 1968 until his discharge for cause at Subic Bay in the Philippine Islands on March 5, 1969.

4. On January 28, 1969, which was a duty day for Escobar, Escobar left the vessel and was absent from the vessel and from his duty without permission from 1300 to 1700 hours, during which time he went to a bar and drank beer.

5. Escobar is not entitled to be paid for the one-half day that he absented himself from the vessel and from his duty without permission.

6. Captain Finn made an official log entry dated January 28, 1969, stating that Escobar had been absent from the vessel. Finn did not, at that time, administer any punishment or fines.

7. Captain Finn has served exclusively on tankers since his graduation from the Maine Maritime Academy in 1950 and his vessels have been in port in his experience usually between 8 and 24 hours at a time.

8. Before trial, Finn had believed it was proper to administer a fine or discipline an offending seaman at any time before the vessel arrived in its next port, and he has always so logged offenses. Although the shipping commissioner of the United States Coast Guard reviews the official log on every voyage, the United States Coast Guard and the shipping commissioner have never advised Finn of any impropriety in his belief as to the proper

manner in which discipline for an official logging is administered.

9. When the vessel was in Sattahip, Thailand, on January 28, 1969, and succeeding days, Finn was exceedingly busy because of alleged cargo contamination. The vessel actually finished discharging its cargo on the afternoon of January 31, 1969, and sailed towards Singapore.

10. At sea, on the morning of February 2, 1969, en route from Sattahip to Singapore, Finn read the official entry and punishment of deduction of one half day's pay to Escobar for the one half day when he absented himself from the vessel and his duty without permission in Sattahip on January 28, 1969. The court treats this logging as a recital of an admitted fact that the plaintiff is not entitled to be paid for one-half day when he absented himself from the vessel and his duty without permission, even if the precise procedure used by Finn does not technically satisfy 46 U.S.C. 702 because the offense was not read to Escobar before the vessel left Sattahip.

11. The vessel arrived at the United States Naval Base in Subic Bay and tied up to a pier on March 4, 1969. At about 4:00 P.M. on that day, a Master's Certificate was given to Escobar for shoreside medical attention to his foot. Escobar decided not to go to the doctor, as he would have had to go on his own time, and instead went ashore and outside the base to the city of Olongapo and spent the evening dancing on his injured foot.

12. On the morning of March 5, 1969, which was a working day for Escobar, Escobar was permitted to go to the physician with his Master's Certificate. The vessel

at that time was scheduled to sail at 4:00 p.m., as Escobar knew. Escobar went to the United States Naval Base medical facility and checked in but did not stay more than 15 or 20 minutes. Escobar's boss was the Chief Engineer, Karl Peters. Another engineering officer reported to Peters that Escobar's name had been called at the dispensary, but Escobar had not been there.

13. According to Escobar's testimony he felt the physicians were too busy to attend to him, and since the ship was to sail it was urgent for him to return to the vessel. He, therefore, left the dispensary without obtaining medical care, but did not return directly to the vessel. Instead he left the Naval Base and went to Olongapo to a bar where he had several bottles of beer and then continued on his way to the vessel.

14. At all times material the vessel was under charter to the United States Navy and Captain Finn had received orders to sail the vessel at 4:00 P.M. on March 5, 1969, for the Persian Gulf. Tugs were assigned to the vessel and a pilot was aboard the vessel. Somewhere within a few minutes (10 to 15 minutes) before the scheduled sailing, Escobar boarded the vessel. Chief Engineer Peters saw Escobar and believed that Escobar had never been to the physician, and had used the Master's Certificate merely as an excuse to go ashore and drink. Peters stopped Escobar and the two men began an argument. Both Peters and Escobar shouted loudly and Escobar, as was his habit, waived his arms vigorously as he was shouting at Peters. Escobar swore at Peters. The commotion attracted the attention of Captain Finn who came out from the midship house and saw Escobar and Peters,

first on the main deck and then on the catwalk, arguing and shouting and waiving their arms.

15. Finn approached the two men and attempted to quiet both men and said to Escobar, "You can't speak to the Chief Engineer that way," referring to the profanity and the mode of speech and tone of voice being used by Escobar.

16. Although Escobar denies the words, the court finds specifically that Escobar did as Captain Finn and Chief Engineer Peters testified, say to both Finn and to Peters, ". . . and I will cut your throat too you son-of-a-bitch and what can you two do about it."

17. Captain Finn has the responsibility for the safety of all members of the crew of the vessel including Escobar and for the vessel itself. Finn did not believe that Escobar was drunk and in fact believed that it might be possible that Escobar would carry out his threat to kill either the Chief Engineer or Finn, and for the safety of the vessel determined that Escobar should be removed from the vessel and put ashore immediately and instructed another seaman to call the police to have Escobar removed from the vessel. At this point Escobar, Finn and Peters went their separate ways.

18. Within a few minutes a Filipino policeman, followed shortly thereafter by some Navy Shore Patrol policemen, arrived on the vessel. Finn took them to Escobar and identified him and told them to remove him for the safety of the vessel. Escobar then packed his possessions to leave the vessel. At which point both Finn and Escobar knew that Escobar's employment relation with the vessel was terminated, and that he was being dis-

charged for cause as the result of his misconduct, and from that moment he was no longer employed by defendant American Trading and Production Company nor was he from that moment any longer a member of the crew of the vessel.

19. Escobar descended the gangway to the shore with his possessions and in the company of the police with one policeman holding him. In descending the gangway Escobar contends that he fell accidentally and as a result of his alleged accidental fall he claims to have sustained some further injury to his back which had caused him some trouble in earlier years. Escobar was taken from the vessel to the United States naval dispensary at the hospital. Finn was otherwise occupied and unaware of the alleged injury until after sailing.

20. Finn had never previously discharged a man for cause overseas. He has previously discharged a man overseas for illness or injury and on those occasions the formalities were left in the hands of the agent. Just before the vessel sailed, the vessel's agent at Olongapo was told by Finn simply that Escobar was being put ashore because he threatened the lives of the Master and the Chief Engineer and Finn told the agent "to take care of everything" or words to the effect.

21. It was Finn's intention simply to put the man ashore and to discharge him for cause and to sail the vessel as scheduled by the Navy. Finn did not have the time to perform the necessary paper work to compute the wages due to Escobar, although he intended that Escobar should collect his wages in due course. Finn did not have time to take Escobar to the United States consul

who was over 100 miles away in the City of Manila, nor did they have time to wait for consul to come to Subic Bay before sailing, if indeed the consul would have come to Subic Bay at all.

22. As soon as the vessel put to sea, Finn radioed messages to the United States consul in Manila, to the United States Navy Base Commander at Subic Bay, to the defendant owners in New York City and to the owner's agent in Manila, C. F. Sharp & Company, advising them that Escobar had been put ashore at Subic Bay because he had threatened the lives of the Chief Engineer and the Captain.

23. While enroute to Singapore, the vessel's next port, Finn gathered the necessary information and computed the net earned wages to which Escobar was entitled at $883.04. (after deduction for advances, income tax, social security tax, slop chest and $6.80 as a fine for the one-half day which Escobar did not work). Finn did not radio the net earned wages due to Escobar to either Manila or to New York at that time. Finn did mail Escobar's voucher from Singapore on March 9, 1969, to the defendant in New York City, and Finn was unaware before trial of any requirement that he pay the earned wages due a discharged seaman within 4 days of his discharge.

24. Escobar remained in the Subic Bay Naval Hospital until March 10, 1969, on which date he was taken by an agent of the company to Manila to the agent's office and then to the United States consul in Manila. At that time, Escobar demanded that his wages be paid and stated that he wanted money to live on and wanted money to fly to Yokohama or Okinawa to obtain a job aboard another vessel.

25. As a result of Escobar's demand for wages on March 10, 1969, the agent radioed New York and New York then radioed the vessel, which was then at sea out of Singapore towards the Persian Gulf, and by the time the vessel radioed back to New York (March 12, 1969) Escobar was on his way back to San Francisco by air, so that no payment of wages took place in the Philippines, other than the advances in kind discussed hereinafter.

26. Escobar was in the area of Manila from about March 10 to March 13, 1969, inclusive. At least two nights he spent in a hotel and one or two nights he spent in custody at the Philippine Immigration Detention Station. The United States consul told Escobar and the company's agent in Manila that Escobar had to go to San Francisco to face charges brought by the United States Coast Guard arising from his misconduct. The agent cabled the company in New York for instructions and they advised that it would be permissible to advance the funds necessary to Escobar to return to the United States if he would sign a guarantee to reimburse them for all of these expenses which he had created because of his misconduct.

27. On March 12, 1969, in Manila, Escobar signed an "Acknowledgement Certificate" guaranteeing to reimburse all of the expenses in the Philippine Islands, and after an airplane ticket was purchased for his return to San Francisco on March 13, 1969, he boarded a plane in Manila which flew directly to San Francisco.

28. Escobar's expenses in Manila caused by his misconduct, including his airplane ticket back to the United States, were $536.72. There is no proof that these expenses were the responsibility of either of the defendants.

They were paid by the agent when Escobar agreed in writing to reimburse the company.

29. In addition, the hospital bill at the United States Naval Base at Subic Bay amounted to $245.00 for care for the injury after Escobar was fired. This bill was also paid by the agent and, pursuant to the Acknowledgement Certificate signed on March 12, 1969, the defendants are entitled to reimbursement for this sum.

30. Upon arrival in San Francisco, Escobar was charged for misconduct by the Coast Guard and several days later, upon advice of his counsel, he entered a plea of guilty to the charges of wrongfully using profane and threatening language to the Master and to the Chief Engineer of the vessel. He received a suspended sentence of his Coast Guard document as a result.

31. The plaintiff's net wages, due to him 4 days after discharge for cause in Subic Bay, were $883.04. His expenses created through his misconduct (but not including the hospital bill) were $536.72. Since he directed that the latter sum be deducted from his earnings to satisfy his expenses created after he was fired for misconduct, the owner properly took credit for those expenses from the earned wages. This left a balance of $346.32 due to the plaintiff in cash as the balance of his earned wages (not including the hospital bill). This sum was not paid to the plaintiff until April 4, 1969, in San Francisco. The payment of April 4, 1969, satisfied completely the owner's obligation to pay the earned wages to Escobar.

32. The plaintiff's base wages as a wiper were $412.11 per month. His base per year would be $4,945.32, for an

average base per day (365 days) of $13.55. Any double wage penalty for each day of penalty is $27.10.

33. Under 46 U.S.C. §596 a discharged seaman is entitled to his earned wages four days after discharge. If he is not paid within two days thereafter without sufficient cause, a double wage penalty may be assessed for each such day of delay in payment.

34. The Court finds that the owner had sufficient cause for delay in payment under these circumstances until Escobar was discharged from the U.S. Naval Hospital on March 10, 1969, but that within four days thereafter payment should have been made to Escobar. The Court therefore finds that Escobar is entitled to a judgment for a double wage penalty of $569.10 for 21 days delay in payment from March 14, 1969, to April 4, 1969, inclusive, a period of 21 days at $27.10 per day.

35. Thereafter, in June 1970, the plaintiff filed a complaint seeking among other things what he alleged to be his unpaid wages, damages for emotional distress, double wage penalties for late payment of his earned wages, and other relief. Defendant American Trading and Production Corporation upon advice of its counsel tendered to the plaintiff in September 1970 a payment in cash of the disputed $536.72 misconduct expenses deducted from earned wages because of the written agreement of the plaintiff in Manila. This payment was specifically made without prejudice to either side's rights arising out of the claim. Since in effect the defendant American Trading and Production Corporation has paid this sum twice to the plaintiff, once in kind by reason of his request and agreement in Manila, and once in cash in San Francisco

in the fall of 1970, the defendant is entitled to a refund of $536.72 from the plaintiff. The defendant, American Trading and Production Corporation also paid the hospital bill of $245.00 and is entitled to be reimbursed for that sum. Defendant is therefore entitled to judgment for $781.72 from the plaintiff.

36. By comparing the amounts of the judgments to which each party is entitled, American Trading and Production Corporation is entitled to a net judgment against the plaintiff in the total amount of $212.62.

37. Plaintiff has failed to prove that either defendant did any act or failed to do any act which was a proximate cause of any alleged emotional or other distress.

38. Plaintiff was discharged for cause on March 5, 1969, and is not entitled to any unearned wages.

Conclusions of Law

1. The Court has jurisdiction of the parties and the causes of action.

2. A seaman who is discharged for cause is not entitled to unearned wages if he is injured or becomes ill after he is fired.

3. The plaintiff has the burden of proof concerning his claim that the defendants were responsible for his alleged emotional distress and has failed to carry that burden.

4. When a seaman is not paid his earned wages within four days of his discharge without sufficient cause, the court may assess a double wage penalty under 46 U.S.C. §596.

5. When a seaman incurs indebtedness and expenses after he has been discharged for cause, he may properly direct satisfaction of these expenses and indebtedness out of his earned wages and a shipowner may properly treat the satisfaction of these indebtednesses and expenses as a payment in kind for which no double wage penalty would be proper under 46 U.S.C. §596.

6. Where the shipowner makes a double payment to a seaman, the first payment in kind and the second payment in cash, the shipowner is entitled to reimbursement for one of the two payments since the seaman is only entitled to be paid once.

7. Where a seaman is injured after a discharge for misconduct, incurs hospital bills for medical treatment, agrees to reimburse the shipowner for any medical bills, and the shipowner pays the medical bills, the shipowner is entitled to reimbursement for the medical bills so satisfied.

8. Since the defendant American Trading and Production Corporation has satisfied the expenses and hospital bills and its expenses are greater than the double wage penalty to which the plaintiff is entitled, the defendant American Trading and Production Corporation is entitled to a judgment against the plaintiff in the amount of $212.62.

9. Defendant Joseph V. Finn is entitled to a judgment dismissing plaintiff's complaint against him with prejudice.

Dated: Sep 8 1972

Manuel L. Real
Judge

In the United States District Court
for the Northern District of California

In Admiralty No. C-70 1245 LHB

Arnold Escobar, Plaintiff,

vs.

The SS Washington Trader, her engines, tackle, apparel, etc., American Trading and Production Corporation, Joseph V. Finn, Jr., Defendants.

[Filed Sep. 11, 1972]

ORDER AND JUDGMENT

The issues in the above-entitled action came on to be heard before the court, and were tried on July 20 and 21, 1972, and findings of fact and conclusions of law having been entered herein on September 8, 1972, and it being determined that plaintiff is entitled to recover five-hundred sixty-nine and ten one-hundredths dollars ($569.10) from defendant American Trading and Production Corporation and that defendant American Trading and Production Corporation is entitled to recover seven-hundred eight-one and seven-two one-hundredths dollars ($781.72) from plaintiff, it is

Ordered, Adjudged and Decreed:

1. That defendant American Trading and Production Corporation have judgment against plaintiff for two-hundred twelve and sixty-two one-hundredths dollars ($212.62);

2. That plaintiff's complaint against defendant Joseph V. Finn be and it hereby is dismissed with prejudice.

Dated: Sep 8 1972

Manuel L. Real
Judge

United States Court of Appeals
for the Ninth Circuit

Arnold Escobar, Plaintiff-Appellant, vs. The SS "Washington Trader", her engines, tackle, apparel, etc.; American Trading and Production Corporation; Joseph V. Finn, Jr., Defendant-Appellee.	No. 72-2944
Arnold Escobar, Plaintiff-Appellee, vs. The SS "Washington Trader", her engines, tackle, apparel, etc.; American Trading and Production Corporation; Joseph V. Finn, Jr., Defendant-Appellant.	No. 72-2995

[Filed Jun. 5, 1974]

Appeal from the United States District Court
from the Northern District of California

Before: CHAMBERS and TRASK, Circuit Judges, and SHARP,* District Judge

PER CURIAM:

Seaman Arnold Escobar and the SS Washington Trader et al. (Shipowner) cross appeal from a judgment which

*Honorable Morell E. Sharp, United States District Judge from the Western District of Washington, sitting by designation.

awarded Escobar limited double wage recovery pursuant to 46 U.S.C. § 596,[1] but ruled in favor of the Shipowner on its counterclaim for repatriation and medical costs paid by it on behalf of the seaman. In light of this court's recent holding in *Matise v. American Foreign Steamship Co.*, No. 72-1345 (9th Cir., March 8, 1974), we reverse in part and remand for a recomputation of the double wage penalty.

The facts relevant to this appeal are as follows: On March 5, 1969, Escobar was discharged as a wiper aboard the SS Washington Trader and ordered removed from the vessel following an incident which occurred while the ship was tied up at Subic Bay, Philippine Islands. While descending the gangplank under police escort, Escobar fell and suffered a minor back injury. He was taken to a local United States naval hospital and remained there for treatment until March 10, 1969. Upon discharge from the hospital, Escobar was taken to Manila where he formally demanded his wages from an agent of the Shipowner. The agent initiated radio contacts between the company's New York office and the SS Washington Trader

[1] 46 U.S.C. § 596 reads, in pertinent part:

"The master or owner of any vessel [making foreign voyages] . . . shall pay to every seaman his wages . . . within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens . . . . Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court . . . ."

(which was then out at sea) but no payment was made. Meanwhile, Escobar encountered difficulties with Philippine immigration officials because of his alien status and was taken into custody. Upon the intercession of the United States consul in Manila, the Shipowner agreed to pay Escobar's air fare to San Francisco and Philippine expenses if Escobar signed a guarantee to reimburse the Shipowner for all the repatriation costs. Escobar signed the agent's "Acknowledgement Certificate" to that effect and was flown to San Francisco on March 13, 1969. He was not, however, paid until April 4, 1969, and from his final wages of $883.04 the Shipowner deducted $536.72 representing repatriation costs. Escobar brought suit against the Shipowner in June 1970 challenging the legality of the wage deduction and asserting other claims arising out of the discharge not relevant to this appeal. On September 14, 1970, the Shipowner, upon the advice of counsel, tendered a cash payment of the disputed $536.72 to Escobar while expressly reserving its rights to the contested sum.

The District Court found that Escobar was discharged for good cause and the Shipowner was not responsible for Escobar's hospitalization and repatriation expenses following discharge. The court characterized the Shipowner's payment of repatriation expenses as a payment of wages "in kind" and concluded that the $536.72 wage deduction made on April 4, 1969, was proper. Escobar was accordingly ordered to refund the $536.72 he subsequently received in cash and to pay an additional $245 to the Shipowner representing unreimbursed medical expenses. However, the court also found that the Shipowner's delay in

paying Escobar's wages was "without sufficient cause" and therefore subject to a 21-day wage penalty pursuant to section 596.[2] Both parties appeal from the above judgment.

Preliminarily, we affirm the District Court's finding that the Shipowner was entitled to reimbursement for the repatriation and medical expenses it incurred on Escobar's behalf following the seaman's discharge for cause. However, this determination does not affect the central issue on this appeal: namely, the legality and consequences of the Shipowner's deduction of these costs from Escobar's wages. Congress has extensively regulated the types of deductions and set-offs which may be made from a seaman's wages, and the Shipowner's mere right to recovery from the seaman will not legalize a deduction that is not recognized by the statutory scheme. *Isbrandtsen v. Johnson*, 343 U.S. 779 (1952). It is therefore necessary to determine whether the Shipowner's deduction of repatriation costs was proper here, and if not, whether the withholding of that portion of the seaman's wages is subject to a section 596 penalty. We believe that the answer to both these questions is circumscribed by *Matise v. American Foreign Steamship Co.*, No. 72-1345 (9th Cir., March 8, 1974). In that case the plaintiff seaman, as here, was discharged for cause in a foreign port. The shipowner

[2]Without any explanation, the District Court found that the Shipowner had sufficient cause for nonpayment of wages during Escobar's hospitalization period from March 5, 1969 to March 10, 1969. The court accordingly assessed double wage penalties beginning on March 14, 1969, (four days after Escobar's discharge from the naval hospital) and running thru April 4, 1969.

purchased an air ticket for the seaman, deducted the fare from the seaman's wages and tendered a voucher for the remainder of the wages. In order to actually collect the wages in San Francisco, the seaman was required to sign a written release. In finding that the air fare deduction constituted an unlawful withholding of Matise's wages, this court stated: "The statutory scheme enacted by Congress does not provide for set-offs or deductions for return transportation expenses, and *Isbrandtsen* has been applied to bar the deduction of repatriation costs from a seaman's wages." Slip opinion at 5; *accord, Schwark v. SS Rio Macareo*, 249 F.Supp. 375 (E.D. La. 1966); *see also, Swain v. Isthmian Lines, Inc.*, 360 F.2d 81 (3d Cir. 1966); 1 Norris, Law of Seamen § 355 (3d ed. 1970). Moreover, in *Matise* this court explicitly rejected the argument successfully advanced below that the Shipowner's purchase of the plane ticket and assumption of expenses constituted a payment of wages "in kind":

> "Although the appellee contends that the transportation money spent on Matise's alleged behalf is the equivalent to the payment of wages to Matise, the applicable statutes explicitly and unequivocally provide that the wages are to be paid *to the seaman*, 46 U.S.C. §§ 596-97. Furthermore, the shipowner here was acting to some extent in its own behalf, in view of its legal obligation to remove all persons, including a discharged seaman such as Matise, whom it had transported to South Vietnam. Even, however, had the money been spent entirely for the benefit of Matise, it could not be treated as a partial payment of his wages and thereby deducted from the total amount of wages that he had earned and to which he was entitled." Slip opinion at 4.

We are therefore compelled to follow the above interpretation of 46 U.S.C. § 596 and *Isbrandtsen, supra,* and conclude that the deduction of repatriation costs from Escobar's wages was improper.

Turning next to the question of whether this deduction constituted a withholding of wages "without sufficient cause" under section 596, we are again bound by the reasoning of *Matise, supra.* The court there rejected the shipowner's arguments that uncertainty as to the legality of the deduction and reliance on the seaman's written release each provided sufficient grounds to remove the withholding from the operation of the penalty statute. With regard to the former justification the court stated:

> ". . . [T]he case law has, for at least two decades, provided full notice to shipowners seeking to avoid the imposition of double wage penalties that only those deductions from wages that are allowed by statute are lawful. As the court remarked in *Swain v. Isthmian Lines, Inc., supra:* 'It has been eminently clear in the law, at the very least since the Supreme Court case of Isbrandtsen Co. v. Johnson in 1952 that a deduction from wages for medical expenses such as were incurred by appellee in the instant case is wrongful as falling outside the proper deductible instances . . . . This question, therefore, has been closed for some time.' 360 F.2d at 83 (footnote omitted).
>
> "It is therefore clear that the shipowner in our case cannot claim that it had 'sufficient cause' to withhold a portion of Matise's wages because of reliance on the general maritime law which did not require a shipowner to pay the cost of repatriating a seaman discharged for good cause. As we have previously indicated, that argument has been without merit since the Supreme Court decided *Isbrandtsen v. Johnson, supra,* over twenty years ago." Slip opinion at 5-6.

Accord, 1 Norris, *supra* § 392. The court also found that because execution of the written release was an express precondition to receipt of wages, the seaman was economically compelled to sign the document. Under these circumstances the court concluded that the shipowner was not justified in relying upon the release it coerced as a "sufficient cause" for withholding Matise's wages. Although the "Acknowledgement Certificate" signed by Escobar was not explicitly a precondition to the payment of wages, we do not feel that this technical difference justifies a conclusion contrary to *Matise.* In the instant case the Shipowner demanded the guarantee from Escobar during the period in which it was unlawfully withholding the seaman's wages. Moreover, this withholding left Escobar, an illegal alien, stranded in the Philippines without funds. In short, these were the very circumstances which prompted Congressional enactment of much of the protective legislation for seamen and section 596 in particular. *See e.g., Ladzinski v. Sperling and Trading Corp.,* 300 F. Supp. 947, 954-55 (S.D.N.Y. 1969).

We conclude therefore that the Shipowner improperly deducted repatriation costs from Escobar's wages and that this action constituted an unlawful withholding subject to the section 596 double wage penalty. The only remaining issue is the designation of the penalty period itself. Despite our concern for a possibly inequitable windfall recovery to the seaman, we agree with the Third Circuit that the language of section 596 is unequivocal and man-

datory. *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81, 84-88 (3d Cir. 1966).[3]

We accordingly reverse in part and remand for further consideration in the light of this opinion.

CHAMBERS, Circuit Judge, concurring:

While I concur in the foregoing, the result is horrible. I am not concerned with the policy of double wage recovery generally. But the statute in this type of case results in a taking which is unconscionable. The Congress should do something about it.

[3]The contrary view would assess the amount of section 596 penalty by considering "the equities of the particular case," Prindes v. SS African Pilgrim, 266 F.2d 125, 128 (4th Cir. 1959). *See also*, Southern Cross SS Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960), *cert. denied*, 365 U.S. 869; Kontos v. SS Sophie, 236 F. Supp. 664 (D.C. Pa. 1964). We find no support for a discretionary assessment of the double wage penalty in the present language of section 596 and find the reasoning in Swain, *supra*, persuasive.

Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1184

AMERICAN TRADING TRANSPORTATION COMPANY, INC.
(Formerly AMERICAN TRADING AND PRODUCTION CORPORATION) and JOSEPH V. FINN, *Petitioners,*

vs.

ARNOLD ESCOBAR, *Respondent.*

SUPPLEMENTAL BRIEF OF PETITIONERS UNDER SUPREME COURT RULE 24 ¶ 5 IN SUPPORT OF PETITION FOR CERTIORARI

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Escobar v. S.S. Washington Trader, 503 F.2d 271 1974 A.M.C. 1420 (9th Cir. 1974);

Matise v. American Foreign S.S. Co., 488 F.2d 469, 1974 A.M.C. 1419 (9th Cir. 1974).

RULES

Supreme Court Rules 23 ¶ 1 (c) and 24 ¶ 5.

DISCUSSION

This supplemental brief is filed under Supreme Court Rule 24 ¶ 5.

Counsel for petitioners herein have learned, just after the actual filing of the Petition herein Wednesday, March 19, 1975, that the Court on Monday, March 17, 1975, granted certiorari in the matter of *American Foreign Steamship Co., a corporation, Petitioner, v. Lilliam M. Matise, as personal representative of Granville C. Matise, deceased, Respondent,* Supreme Court, October 1974 Term, No. 74-966. The granting of certiorari in *Matise* is significant in relation to this case.

The purpose of this Supplemental Brief is to show the relationship of the two cases.

The *Matise* case and this case present identical questions, although this case presents additional questions.

A review of the Petition for Certiorari filed in the *Matise* case shows that the questions presented by this Petition are to a large degree the same as questions 2 and 3 of the Petition in the *Escobar* case.

The chronology of the developments of *Matise* and *Escobar* in the Court of Appeals for the Ninth Circuit is important. The *Matise* case was argued first, and the *Escobar* case was then argued without knowledge of anyone involved that the *Matise* case had been decided, because the *Matise* opinion had not yet been released.

The *Matise* opinion was printed and released and then the *Escobar* panel decided the *Escobar* case on the basis of the *Matise* opinion. Contained within the *Escobar* opinion was footnote No. 3, 503 F.2d at 274, 1974 A.M.C. at 1430, stating in part that equity (discretion) was not to be used in measuring penalties. This issue was not briefed and was not argued to the Ninth Circuit in the *Escobar* case and was not even before the Court of Appeals.

When the *Matise* matter was remanded then to the District Court, the *Matise* judge there considered himself bound by footnote No. 3 in *Escobar* and rendered judgment accordingly.

Therefore the *Escobar* case has been decided on the precedent of *Matise,* and the *Matise* case has been subsequently decided on the precedent of a footnote in the *Escobar* case. The two cases are so intertwined that it must be manifest that with certiorari granted on the one it should be granted in the other.

Respectfully submitted,

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March 25, 1975.